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No. 644

In the Supreme Court of the United States

OCTOBER TERM, 1958

THEODORE J. CHAPIN AND ADAM SYDLIK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The order of the United States District Court for the Southern District of California granting the Government's motion for summary judgment (R. 29–30) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 2–12) is reported at 258 F. 2d 465.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 27, 1958 (R. 92). A timely petition for rehearing was denied on October 17, 1958 (R. 93). The petition for a writ

of certiorari was filed on January 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in refusing to impose Federal Tort Claims Act liability against the United States, both courts below erred in concluding that, under the governing California law of *respondeat superior*, the serviceman here involved was not acting within the scope of his employment at the time of the accident.

STATUTES INVOLVED

Sections 1346(b), 2674, and 2671 of Title 28 U.S.C. (the reenactment of the Federal Tort Claims Act, 62 Stat. 933, 983, 982), provide in pertinent part:

> SECTION 1346. *United States as defendant.*
>
> * * * * *
>
> (b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * * *
>
> SECTION 2674. *Liability of United States.*
> The United States shall be liable, respecting

the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

SECTION 2671. *Definitions.*

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term—

* * * * *

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment," in the case of a member of the military or naval forces of the United States, means acting in line of duty.

STATEMENT

Petitioners brought suit under the Federal Tort Claims Act, *supra*, pp. 2–3, to recover damages resulting from a collision between an automobile driven by petitioner Adam Sydlik, in which petitioner Theodore J. Chapin was a passenger, and an automobile owned and operated by Herman H. Frehe, a Private First Class in the United States Army (R. 3–11).[1]

[1] Petitioners brought separate actions, but, prior to trial, the cases were consolidated pursuant to stipulation and subsequent order of the District Court (R. 19–20).

On the basis of stipulated facts, considered in the light of the governing *respondeat superior* law of California (the place where the accident occurred), the District Court concluded that Frehe, at the time and place of the accident, was not acting within the scope of his employment, and, hence, that the Government could not be held liable under the Tort Claims Act for his alleged negligence in operating his private car. The District Court accordingly granted the Government's motion for summary judgment which was predicated on the absence of any factual dispute on the issue of scope of employment (R. 29–30).[2]

The stipulated facts show that on April 4, 1956, Pfc. Frehe was traveling in his private automobile en route from Norton Air Force Base, California, to Ft. Hood, Texas, under orders transferring him to Ft. Hood on a permanent change of station (R. 32–34). His orders had authorized travel by private automobile and thereby entitled him, in lieu of travel by common carrier, to be reimbursed for his travel expenses in accordance with Army regulations (R. 32–33). The orders further provided that Frehe's travel was "necessary in the military service"; that he was entitled to four days delay en route which would be chargeable as leave; and that he was required to report for duty at Ft. Hood on April 12, 1956 (R. 33). It was while so traveling, on Highway 60–70 in Riverside County, California, that the collision which gave rise to this action occurred.

[2] This disposition of the case rendered unnecessary a trial on the controverted issues of negligence and damages.

Applying the California law of *respondeat superior* to these facts, the District Court concluded that, under the law of that State, Pfc. Frehe was not acting within the scope of his employment at the time of the accident, and that the Government was not therefore liable under the Federal Tort Claims Act (R. 29).

The Court of Appeals, in an opinion which carefully discussed and analyzed in detail the pertinent California *respondeat superior* authorities—particularly, the recent decision in *McVicar* v. *Union Oil Co.*, 138 Cal. App. 2d 370—concluded, as did the District Court, that Frehe was not within the scope of his employment at the time of the accident. And the Court of Appeals rejected petitioners' contention that the peculiar status of a member of the armed services required a result different from that which would be reached by the California courts in determining *respondeat superior* liability vis-à-vis private employees. Accordingly, the judgment of the lower court was affirmed (R. 92).

ARGUMENT

Both courts below, in applying the California law of *respondeat superior*—as required by this Court's decision in *Williams* v. *United States*, 350 U.S. 857—have in this case exonerated the Government from liability under the Tort Claims Act. Both courts have concluded that, under California law, the serviceman's use of his private automobile in traveling to a new duty station involved conduct beyond the control of the employer, and for which the employer (the United States) could not be held responsible. The decision below is correct under the governing California prin-

ciples of *respondeat superior*, and warrants no further review by this Court. Two Courts of Appeals, it is true, have reached a different result on similar facts, but those decisions involve the *respondeat superior* law of States other than California. The purported conflict of decisions is not real, but one which is inherent in the required determination of Tort Claims Act liability "in accordance with the law of the place where the act or omission occurred", *supra*, p. 2. And it is now settled that, in Tort Claims Act suits involving torts of servicemen, the "scope of employment" question is governed by the same local *respondeat superior* rules that are applicable to the torts of civilians. *Williams* v. *United States*, 350 U.S. 857.

1. There is no question that California law is controlling on the issue of whether there is *respondeat superior* liability on the part of the United States for Pfc. Frehe's purportedly negligent driving of his private automobile. *Williams* v. *United States*, 350 U.S. 857. In *Williams*, a soldier had injured the plaintiff while driving a military vehicle for personal enjoyment. The District Court had ruled that the soldier was not acting within the scope of his employment (105 F. Supp. 208). The Court of Appeals for the Ninth Circuit affirmed (215 F. 2d 800), but, in doing so, held that federal law—not the local *respondeat superior* law applicable in determining federal liability for the torts of civilian personnel—must be looked to in determining whether the soldier had been acting in "line of duty."[3] This Court

[3] See 28 U.S.C. 2671, *supra*, p. 3.

granted the petition for certiorari, and, ruling that local *respondeat superior* doctrine extends to torts of military (as well as civilian) personnel, stated in its *per curiam* decision (350 U.S. 857):

> This case is controlled by the California doctrine of *respondeat superior*. The judgment is vacated and the case is remanded for consideration in the light of that governing principle.[4]

This Court's *Williams* decision thus precludes a different standard for determining the scope of employment for military personnel, on the one hand, and civilian personnel, on the other; local *respondeat superior* principles are fully applicable in both situations.

In line with the clear mandate of *Williams*, the court below carefully analyzed the pertinent California cases in considering whether *respondeat superior* liability should be imposed upon the United States. It concluded, as had the California District Judge,[5] that *McVicar* v. *Union Oil Co.*, 138 Cal. App. 2d 370, represented the most recent expression of California law on the scope-of-employment status of

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[4] The accident in that case occurred in Guam, which had adopted the rule of *respondeat superior* in force in California. See *Williams* v. *United States*, 215 F. 2d 800, 802.

[5] Upon remand, the District Court reexamined the case in the light of the California doctrine of *respondeat superior*, and, upon that basis, again concluded that the serviceman was not acting within the scope of his employment (141 F. Supp. 851). The Court of Appeals affirmed on the same basis, 248 F. 2d 492, and this Court denied certiorari, 355 U.S. 953.

[6] See R. 50–51.

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a transfer employee during the period of travel in his private automobile from his former place of employment to his new place of employment. In *McVicar,* a United Airlines employee was transferred from the United facilities at San Francisco to those at Spokane, Washington. He travelled to Spokane in his own pickup truck carrying his working tools with him. En route he was involved in an automobile accident. Since he was paid by the hour, he was not being compensated for the time spent traveling; however, he was carried on the United Airlines payroll records at all times. Although he was not being reimbursed for his traveling expenses, the evidence showed that United, if the employee had so elected, would have transported him by airplane to Spokane free of charge. The California First District Court of Appeal unanimously held that the employee was not acting within the scope of his employment while traveling from San Francisco to Spokane pursuant to the transfer. The court stated (138 Cal. App. 2d 370, 373):

> * * * The employer had no right to control or direct [the employee] as to time, route, mode of transportation, or any feature of his going from San Francisco to Spokane. He could have gone in an airplane of his employer free of charge. He could have gone by bus, train, motorcycle, automobile or have flown his own private airplane if he had one. He could start when he pleased, stop when he pleased and go by any route that he pleased so long as he arrived in Spokane in time to report for work on December 1. His employer not only had

no right to direct him to go by any particular means of transportation but also no right to forbid him to do so. He could have driven a car with faulty or no brakes and his employer had no right to interfere. To put the test of the cited case, if instructions were given they would not have been obeyed.

In addition, the California court approved and discussed (*id.* at 374) two Federal Tort Claims Act cases "nearly in point" in which the Court of Appeals for the Fourth Circuit held that soldiers utilizing their private automobiles under competent orders transferring them to new duty stations were not acting within the scope of their employment, in the sense required for application of *respondeat superior* liability. *United States* v. *Sharpe,* 189 F. 2d 239 (C.A. 4); *United States* v. *Eleazer,* 177 F. 2d 914 (C.A. 4), certiorari denied, 339 U.S. 903.[7]

It follows that the courts below, applying California *respondeat superior* law, as expressed in *McVicar,* properly concluded that the serviceman here involved was not acting within the scope of his employment at the time of the accident. As in *McVicar,* Pfc. Frehe's use of his private automobile was not

[7] In holding the Government not liable in *Sharpe*, *supra*, the Fourth Circuit declared (189 F. 2d 239, 240):

"* * * The fact that [the serviceman] was going to Eglin Field where it was his duty to report at a certain time does not impose liability on the government, for he had undertaken to get there on his own responsibility and the operation of the automobile was undertaken on that responsibility, not as an activity of the government. It would be as reasonable to hold the United States liable for injuries inflicted by a clerk of court while using his private automobile in traveling to the place of holding court."

related to the duties that he was to perform for the Government. And, as in *McVicar*, the Government had no interest in the means Frehe used to reach Fort Hood, Texas; its only interest was that he arrive there by April 12, 1956, in order to assume his army duties at that post.

Petitioners' contention that the "unique" (Pet. 29) status of a serviceman requires a different result from that reached in *McVicar* with respect to a private employee was properly rejected by the Court of Appeals which "found no reasonable basis in California law for such a distinction" (Pet. App. 12). Moreover, this Court's decision in *Williams* v. *United States*, 350 U.S. 857, precludes resort to any such distinction. Thus, contrary to petitioners' argument (Pet. 28–29), the courts below meticulously observed the Court's direction in *Williams*, *i.e.*, that Federal Tort Claims Act suits based upon torts of military personnel are to be governed by local principles of *respondeat superior*.

As we have shown, the decisions of both courts below were based solely on their interpretation and application of the *respondeat superior* law of California. We also think that their interpretation of California law was correct as applied to the facts of this case,[8] and that in any event no further review is

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[8] It should be noted that none of the California cases cited by petitioners bears the factual resemblance to this case that *McVicar* does. *E.g.*, *Carr* v. *Wm. C. Crowell Co.*, 28 Cal. 2d 652, involved a suit against a building contractor whose employee, while at work, struck another employee with a hammer in the course of an argument; *Cook* v. *Sanger*, 110 Cal. App. 90, involved a suit against an employer for damages caused by an employee's car which was being used expressly to perform an errand for the employer; *Curcic* v. *Nelson Display Co.*, 19 Cal.

warranted. See *Propper* v. *Clark*, 337 U.S. 472, 486–487; *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707–708; *Helvering* v. *Stuart*, 317 U.S. 154, 163.

2. It is true that the Tenth Circuit in *United States* v. *Mraz*, 255 F. 2d 115, and the Fifth Circuit in *Hinson* v. *United States*, 257 F. 2d 178, concluded that servicemen, in situations similar to that involving Pfc. Frehe here, were acting within the scope of their employment. But those decisions, in line with *Williams*, were concerned with the law of the particular State where the accident occurred: in *Mraz*, New Mexico law, and in *Hinson*, Georgia law. In *Mraz*, the Tenth Circuit noted that other federal courts had reached different results on the basis of other controlling state authority. 255 F. 2d 115, 117. Indeed, the Tenth Circuit noted that it itself had reached a different result in a case requiring the application of the law of Wyoming (*ibid.*). In *Mraz*, however, the Tenth Circuit was of the view that *respondeat superior* liability had to be imposed because, as the court stated, "[*t*]*o paraphrase New Mexico law*, the accident occurred while the officer was engaged upon government business in furtherance of the govern-

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App. 2d 46, involved a suit against an employer for damages caused by its window trimmer employee's car, which car was essential to the performance of his duties and was being used at the time of the accident to perform those duties; *Gayton Engineering Co.* v. *Industrial Accident Commission*, 95 Cal. App. 2d 740, a workmen's compensation case distinguished in *McVicar*, *supra*, at 373, and by the court below (Pet. App. 8, fn. 12), involved an accident arising out of a painter-employee's use of his truck to get to his new place of employment where the truck would be of special utility to the employer.

ment's interest." 255 F. 2d 115, 118. (Emphasis added.)

In *Hinson*, the Fifth Circuit, in an opinion saturated with a discussion and citation of Georgia authorities, held that the law of that State compelled the conclusion that the serviceman there involved was acting within the scope of his employment. The court did note that it found support for its conclusion in decisions from other jurisdictions, but expressly added that (257 F. 2d 178, 183):

> To the extent that many of these cases arise under the Tort Claims Act, it must be recognized, of course, that the decisions must rest, as does this one, on the law of the state where the damage occurred.

Obviously, therefore, the result reached by the courts below in this case, based upon California law, cannot be said to be in conflict with the decisions in *Mraz* and *Hinson*, based, respectively, on New Mexico and Georgia law.[2] For that reason, the Government did not petition in *Mraz* or *Hinson*.

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[2] Petitioners' reliance on the Ninth Circuit's earlier decision in *United States* v. *Kennedy*, 230 F. 2d 674, is misplaced. That case was expressly distinguished by the court below (Pet. App. 6, fn. 7) as one in which the Government had conceded the issue of scope of employment. See *Kennedy*, *supra*, at 675. Moreover, *Kennedy* involved the application of Washington law.

Petitioners' final contention (Pet. 4, 30-32), that it was error to grant the Government's motion for summary judgment because of the existence of a genuine issue as to a material fact, does not present a question warranting review by this Court, and, moreover, is without substance. There was no dispute as to any of the evidentiary facts. The sole dispute in the case was whether, upon the stipulated basic facts, Pfc. Frehe was acting, as a matter of law, within the scope of his

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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employment at the time the accident occurred. Cf. *Hinson* v. *United States*, 257 F. 2d 178, 179 (C.A. 5). The issue was purely legal in nature and properly determinable on a motion for summary judgment. See *Fox* v. *Johnson & Wimsatt*, 127 F. 2d 729, 736 (C.A.D.C.); *Palmer* v. *Chamberlin*, 191 F. 2d 532, 540 (C.A. 5).

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